FILE COPY

SEP 12 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

vs.

HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs., S. en C.)
Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

WILLIAM CATTRON RIGBY,
Attorney for Petitioner,

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Of Counsel.

Rufus H. Darby Printing Co., Inc., Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

VS.

HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs., S. en C.)
Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

I

Examination of respondents' brief in opposition rather emphasizes the correctness of our position and of the distinction drawn in our petition and brief between the kind of "reasonableness" which means the wisdom or expediency of administrative action within the acknowledged limits of executive power, and the other kind of "reasonableness" which has to do with the question whether or not in the exercise of police powers or other kindred powers the executive arm has reached beyond the proper limits of

its powers and has acted arbitrarily or capriciously so as to deprive any person of liberty or property without due process of law. The first kind of "reasonableness"—or "unreasonableness" on the contrary,—in the exercise of admitted executive power,—that is to say, any question of the wisdom or unwisdom or expediency or inexpediency of executive action within its own province,—can never be a judicial question, nor the subject of judicial review in a constitutional court of the United States. As was well said by the Circuit Court of Appeals for the First Circuit itself in its former opinion when this same controversy came up upon the initial bill for injunction (*South Porto Rico Sugar Co. and Russell & Co.* v. *Miguel A. Munoz, et al., Public Service Commission of Puerto Rico,* 28 F. (2d) 820, 821; Petition, Appendix II, p. 46):

> "Courts have no general supervisory power over such tribunals as Public Service Commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights."

That is the only kind of "reasonableness",—and the only kind of question,—here involved. Russell & Co. had accepted a franchise subject, by its own terms, and by the express direction of the Act of Congress under which it was granted,[1] to cancellation at any time at the discretion of the Puerto Rican government. It was cancelled by the executive body,—the Public Service Commission,—clothed with the executive power for that purpose, after a full hearing and for administrative reasons which the Commission judged sufficient to require the cancellation; viz., that the franchise holder was improperly permitting the level of the lake to rise, in violation of the terms of the franchise, to such a height as to cause extensive flooding of the neighboring Municipality of Lajas.

---

[1] Section 3 of Joint Resolution of Congress No. 23, May 1, 1900, 31 Stat. 715; quoted, petition for certiorari pp. 13-14.

If the exercise of such administrative discretion to cancel such a franchise in accordance with the express terms of the franchise itself, is subject to judicial review, then it means that the franchise is not really terminable at all in the discretion of the government in accordance with the terms upon which the grantee accepted it and upon which the Congress required that it should be granted; but is really perpetual; and can only be terminated upon the same basis as though it did not contain the clause reserving to the government the right to repeal it. But that cannot be true. Manifestly, the executive authority of the government has, under this clause reserving the power of cancellation, the same power to cancel it at discretion that a landlord has in any ordinary lease terminable at will or from month to month; and its termination by the executive authority is no more subject to judicial review than is the action of an ordinary landlord in exercising his discretion to terminate such a lease.

II

The cases cited in respondents' brief in opposition are not to the contrary. They really recognize the distinction between the two different classes of cases,—between the two kinds of "reasonableness". They are all cases dealing with questions of the executive power overstepping its province and attempting to exercise arbitrary or capricious powers and thereby depriving persons of liberty or property without due process of law. For example, in the first case which they cite (Respondents' brief, pp. 6-7), *Pacific Telephone and Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, the question involved, as stated by Chief Justice Taft at the outset of the court's opinion (265 U. S., at pp. 197-198) was "of the *confiscatory character* of rates for telephone service within the State of Washington and in the cities of Seattle and Tacoma" (*italics supplied*), and the bill for injunction was rested on an allegation (*ib.* p. 198) "that the order of the Department of Public Works if enforced

would deprive the company of its property without due process of law, in violation of the Fourteenth Amendment"; the order being one forbidding the company from putting into effect "the increased rates which the company proposes in all parts of Washington except Spokane", and the company claiming (*ib.* p. 199) that the rates fixed by the Commission *"were confiscatory."* Manifestly, the question there involved was wholly different in character from the question here, which is simply of the "reasonableness", or rightness, or wisdom, of this Commission's exercise of the power, which the Circuit Court of Appeals agrees that it holds (R. 96), to repeal this franchise in strict accordance with its terms.[2]

---

[2] It is immaterial that the insular statute (Public Service Act, Sec. 85, petition for certiorari, Appendix I, p. 42) as interpreted by the insular courts (R. 54 and R. 80, 81), may give such executive power, to determine whether the Commission's order is "reasonable", to the insular courts, which are not constitutional courts of the United States. The legislative authority may invest Congressional courts with administrative powers (*Keller* v. *Potomac Electric Co., supra,* 261 U. S. 428, 444; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 468-469; *Radio Commission* v. *Nelson, supra,* 289 U. S. 266, 275); but not constitutional courts of the United States, such as the Circuit Court of Appeals.

(Whether the Legislature of Puerto Rico may validly invest the Puerto Rican insular courts with such executive power, in view of the provisions of the Organic Act for that Island distributing the governmental powers among the legislative, executive and judicial departments of the insular government in analogy to the distribution of such powers made by the Constitution for the federal government (*"Board of Control Cases", Springer and Agoncillo* v. *Philippine Islands,* 277 U. S. 189) is another question, not of present importance in this case, since the Public Service Commission's order was in fact approved by both of the insular courts, the District Court of San Juan and the Supreme Court of Puerto Rico.)

And in the second case cited by respondents (Brief, pp. 7-8) *Federal Radio Commission* v. *Nelson*, 289 U. S. 266, this court recognized the distinction between the two classes of cases, and that the judicial power is not concerned with any question of "the **wisdom or expediency** of the administrative action" (*ib.* p. 277). In that case the District Court of Appeals' reversal of the Radio Commission's order rested on the ground that the Commission's order was "in a legal sense **arbitrary and capricious**" (*ib.* p. 269). This court there expressly recognizes that a constitutional court of the United States may not review the exercise of executive discretion by administrative or executive authorities (*ib.* p. 275), and points out that under the 1930 amendment of the Federal Radio Act of 1927 (Act of July 1, 1930, c. 788, 46 Stat. 844, amending section 16 of the Act of 1927) the authority of the District Court of Appeals is limited "to questions of law" and to an examination of whether the Radio Commission's findings and orders "are *arbitrary or capricious*" (*ib.* pp. 275-276; *italics supplied*). That was the kind of question of "reasonableness" which this court in that case held it might review by virtue of its judicial powers under the Constitution, saying (*ib.* p. 276):

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass";

and that (*ib.* pp. 276-277)

> "The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an at-

> tempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. * * * Such an examination is not concerned with the weight or evidence or with the wisdom or expediency of the administrative action. * * *
>
> "* * * The controlling question is whether the function to be exercised by this Court is a judicial function, and if so, it may be exercised on an authorized appeal from the decision of an administrative body."

That is wholly in accordance with what was said in *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 444, cited in our original brief (p. 28) and with the general rule, upon which we rely, of the limits of the judicial power.

And the last case cited by respondents in their brief in opposition (pp. 8-9) *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S. 491, holds only, as quoted by the respondents themselves (brief, p. 9) from the headnote of that case, that

> "the reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation;"

and that (p. 502) as this court had said in *Shields* v. *Ohio*, 95 U. S. 319, 324:

> "The alterations must be reasonable * * * and *consistent with the scope and object of the act of incorporation.*" (*Italics supplied*)

But that has nothing to do with the question here involved. This was not an alteration or amendment. It was an outright repeal, pursuant to a power expressly reserved in the franchise itself, which was one of the conditions upon which the grantee accepted it. As this court said in *Shields* v. *Ohio, supra*, 95 U. S. 319, 324:

> "It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is

consensus facit jus. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State.

"Where an act of incorporation is repealed, few questions of difficulty can arise."

III

While it is true that the Circuit Court of Appeals says in its opinion (R. 102) that,

> "Under the circumstances disclosed by this record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the Lake [3] would, in our opinion, be an arbitrary and unreasonable act, if it involves, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz: the right to take 20,000,000 gallons of water daily from Guanica Lake",

and that (R. 102-103),

> "To avoid future damages from flowage of lands in Lajas, it was only necessary to amend or modify the franchise by requiring the establishment of a guage above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the guage so established";

yet the court, in saying that, apparently wholly fails to notice the important, *and controlling,* fact that this fran-

---

[3] The only part of the original tripartite franchise for irrigation, railroad, and wharf, in which Russell & Co., or these respondents, claim any ownership in this case; and the only part of the franchise in any way involved here, (R. 26-27; petition for certiorari, pp. 6-7; and order cancelling the franchise, R. 29-30).

chise, on its face, is terminable at any time at the discretion of the government;[4] and wholly fails to explain how, in view of that contractual right expressly reserved to the government, the cancellation could in any way be considered as an "arbitrary and unreasonable act", or the "taking of a valuable property right acquired by the appellants under the franchise", since it is axiomatic that "*consensus facit jus*" (*Shields* v. *Ohio, supra,* 95 U. S. 319, 324),—if the Circuit Court meant to use those words as indicating in any way that the action of the Commission was beyond its powers or was an illegal taking of property of Russell & Co. without due process of law. And if the court does not mean to say that, but means only to indicate its belief,—which is as far as its language really goes,—that the act of the Commission was "an arbitrary and unreasonable act" in the sense that, if the members of the court had been sitting as members of the Commission, they would have thought that the wiser or more reasonable thing to do would have been to modify the franchise in some such way as the court indicates, instead of cancelling it,—then that is simply an attempt to substitute the individual judgment of the members of the court for that of the members of the Public Service Commission on this question of administrative discretion, which was within the jurisdiction of the Commission, but wholly beyond judicial review by a constitutional court of the United States.

IV

It is believed unnecessary to add anything to what is said in Points III and IV (pp. 28-30) of our original brief.

---

[4] Paragraph XVIII of the franchise (R. 15):

> "In accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchise, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal."

Manifestly, this franchise was in the nature of a local law; and plainly, as it seems to us, these six individuals have no more standing to act here on behalf of the *Sociedad en Comandita*, than have the stockholders of an ordinary corporation to act in relation to the corporation's property. As pointed out in our original brief (p. 30) these individuals took their appeal from the Supreme Court of Puerto Rico in this case six months after this court had held on March 13, 1933, in relation to this very same *Sociedad en Comandita*, Russell & Co., that it was to be treated as a corporation for the purposes of jurisdiction of the federal courts, and not as a partnership (*People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476).

It is submitted that, as urged in our original brief in support of the petition, the writ of certiorari should be granted, and respondents' appeal from the Supreme Court of Puerto Rico should be dismissed as moot, in the absence of the necessary party, Russell & Co., Sucrs. S. en C., or else that the judgment of the Supreme Court of Puerto Rico should be affirmed.

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Of Counsel.